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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 718

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.*, CITY OF HIGHLAND PARK, a municipal corporation of Illinois,

Petitioner,

vs.

GEORGE B. McKIBBIN, Director of Finance of the State of Illinois, Successor to A. M. Carter,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The City of Highland Park, a municipal corporation of the State of Illinois, presents this petition in the name of the People of the State of Illinois to review a decision of the Illinois Supreme Court denying a tax refund to the petitioner.

The Public Utility Tax Act, under which compulsory payments had been collected by duress, contained a refund provision for "errors of law". The Court held the Act unconstitutional and also held that the refund section fell therewith. This repudiation of the refund section of an invalid tax act deprived petitioner of property without due process of law.

SUMMARY STATEMENT OF MATTER INVOLVED

On June 27, 1935, there became effective in the State of Illinois a Public Utility Tax Act, imposing a three per cent tax upon the gross receipts from sales of water, gas and electricity. (Illinois Revised Statutes (1935 State Bar Assn. Edition), Chap. 120, Pars 440-453, Secs. 1-14). Petitioner, City of Highland Park, a municipal corporation of Illinois, was operating a municipal water plant, furnishing and selling water to its citizens. The City was ordered to pay the tax or be subject to prosecution under the misdemeanor section, and to the penalties provided (Rec. 4). Threats of prosecution were made against this City (Rec. 37).

Petitioner paid the tax under protest although the State Supreme Court decision indicates that plaintiff merely argued it paid its tax under protest. The complaint in Paragraph 7 (Rec. 4) alleged that installments of taxes were paid under protest. The motion to dismiss, as sustained, so admitted. This allegation was ignored by the State Court despite petitioner strenuously pointing this out in its briefs and petition for rehearing (Rec. 30).

These duress payments made monthly from July 1935 to January 1937 under protest aggregated $4,796.97 (Rec. 3).

On February 12, 1937, the Supreme Court of Illinois held this Public Utility Tax Act unconstitutional (*City of Chicago* v. *Ames*, 365 Ill. 529) on the ground that the Act made an unreasonable discrimination between taxpayers.

The City of Highland Park, thereafter, filed its claim for refund of taxes under said refund provision of the Act, as follows:

> "445. Erroneous payments—Credit.] § 6. If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Act from the public utility which made the erroneous payment, or such amount shall be refunded to such public utility by the department."
>
> Illinois Revised Statutes (1935 State Bar Assn. Edition), Chap. 120.

Upon denial of its claim, the City of Highland Park instituted a mandamus proceeding in the Circuit Court of Cook County, Illinois. The Circuit Court judge denied relief because he thought the refund section itself was unconstitutional. The lower court's decision on this point, however, was nullified by a later Illinois Supreme Court decision holding that a similar refund section in a similar Act was constitutional (*Swartchild* v. *Carter*, 376 Ill. 590).

On appeal the Supreme Court denied petitioner its refund on the ground that the refund section fell because the tax was unconstitutional. This decision of the Supreme Court permitted the State of Illinois to keep the taxes which had been illegally exacted from the City of Highland Park. Petitioner's taxes had been paid because of compulsion, under protest and in reliance on the refund provision. The wording of the refund section, covering

"errors of law", was broad enough to take care of the contingency which occurred—unconstitutionality.

In the light of the inducement made for payment, by the refund section, the decision of the Illinois Court makes the legislative act an entrapment.

BASIS OF JURISDICTION

The Supreme Court of Illinois on September 14, 1942, denied petitioner, the City of Highland Park, refund of its $4,796.97 of taxes erroneously collected under an unconstitutional Tax Act (Rec. 14-19). Petition for rehearing was denied November 10, 1942 (Rec. 40). This petition was presented for filing within the three months period prescribed by Section 8 of the Act of February 13, 1925, calculating the time from denial date of the rehearing petition. This is within statutory time under several rulings of this Court.

The invalid Tax Act, under which petitioner was compelled to pay its taxes, carried a special refund provision providing for the return of taxes erroneously collected through mistake of fact or error of law (Rec. 3). Unconstitutionality is the result of an error of law. This Court has held the mere failure to return taxes illegally collected under compulsion violates the due process clause of the constitution. In case at bar there was a refund provision and the taxes were collected under duress (Rec. 4, 37) and paid under protest (Rec. 4).

The federal constitutional question was raised for the first time in the petition for rehearing (Rec. 29) with explanation, however, that it had not been raised before because of the taxpayer's sincere belief in the refund

section. Federal Supreme Court decisions were also cited (Rec. 29).

This Court has held that where the occasion for raising the federal question arose unexpectedly from the ground of the State Court's decision it is not too late when first raised upon petition for rehearing.

> *Great Northern Railway Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 367.

Or where the federal question arose from an unanticipated construction of a state statute.

> *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 665-6.

The Supreme Court of Illinois had allowed refunds to some taxpayer plaintiffs in the same suit that held the Tax Act unconstitutional, yet denied relief to this petitioner (365 Ill. 529). In not treating all taxpayers alike there is a further violation of the 14th Amendment in such discrimination as petitioner is denied equal protection of the laws under the refund section.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344 (b)), also under Rule 38 of this Court.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the fourteenth amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The Legislature of Illinois enacted a Public Utility Tax Act in violation of one of the restrictions imposed upon the Legislature by the Constitution of Illinois. In the same Act was a refund section providing for a refund if taxes were paid under mistake of fact or error of law. Petitioner, City of Highland Park, alleged (Rec. 4) it was ordered to pay the monthly tax or be liable to onerous penalties and prosecution for a misdemeanor for violation of the Act (Illinois Revised Statutes (1935 State Bar Assn. Edition), Chap. 120, Par. 444, Sec. 5). Petitioner was threatened by letter with prosecution (Rec. 37). Petitioner accordingly paid the tax, under protest, until the Act was held unconstitutional by the Supreme Court of Illinois.

Thereupon a request was made upon the State for a credit or refund of its taxes in accordance with the refund section, and after refusal this Mandamus action was instituted. The Supreme Court of Illinois held, in this action, that the refund section providing for the contingency of unconstitutionality "fell with the rest of the Act when the taxing section was declared unconstitutional" (380 Ill. 447, 451). This decison was rendered despite the fact, as admitted by motion to strike, that the payments were made under protest by virtue of duress, and notwithstanding that the refund section provided for the contingency of unconstitutionality and provided for the reimbursement to the taxpayer. In a prior decision (*City of Chicago, et al.*

v. *Ames*, 365 Ill. 529, 537), holding the Public Utility Tax Act unconstitutional, the Illinois Supreme Court provided for the return of taxes paid by the plaintiff municipalities in that case.

On these facts the questions presented are:

1. Has the City of Highland Park been deprived of property without due process of law under the 14th Amendment of the Constitution of the United States?
2. Has the City of Highland Park been deprived of equal protection of the law by reason of similar tax refunds given other municipalities but denied the City of Highland Park?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of the United States has held that where a State collects an illegal tax under compulsion and duress, and refuses to return the tax, it is a violation of the 14th Amendment of the Constitution of the United States, because it deprives the citizen of property without due process of law. The Supreme Court has pointed this out in:

Ward v. *Board of County Commissioners of Love County* (Oklahoma, 1920), 253 U. S. 17, 23-24.

Carpenter v. *Shaw* (Oklahoma, 1930), 280 U. S. 363.

Montana National Bank v. *Yellowstone County* (Montana, 1928), 276 U. S. 499, 504.

The United States Supreme Court has held that it is a violation of the 14th Amendment of the Constitution of the United States for a State to deny to any person within its jurisdiction the equal protection of the laws.

The City of Chicago and certain other municipalities recovered the taxes they paid under protest (365 Ill. 529, 537). Petitioner in case at bar, in an equal protection of the law, is likewise entitled to recover.

To permit this decision to stand will create a new vehicle of fraud upon taxpayers. A state can deliberately pass an unconstitutional tax act and in the same act provide for refunds if the tax is unconstitutional. The taxpayer is snared by the promise in the refund section. The refund is later denied not because the refund section is invalid but because the tax was unconstitutional. The state by this device can accomplish what is denied by the Constitution and thereby deprive the taxpayer of property without due process of law.

A tax was collected under an act that was a nullity and which was "* * * as inoperative as though it had never been passed" (*Norton* v. *Shelby County,* 118 U. S. 425, 442). The state without authority and by force and compulsion exacted this money from plaintiff. To not return this money or its equivalent at this time, deprives petitioner of property without due process of law.

The decision sought to be reviewed here is a final judgment of the court of last resort of the State of Illinois. There had been drawn in question in said court the validity of part of a State Statute. The decision holding the refund provision of the statute invalid on the facts is repugnant to the 14th Amendment of the Constitution of the United States. Petitioner has a title, right and privilege under the Constitution of the United States which it has a right to assert. The decision of the federal question was necessary to the judgment rendered by the Illinois Supreme Court. It is important to all Illinois

taxpayers to know whether they can rely on a tax refund section when a tax is illegal.

WHEREFORE, your petitioner respectfully requests that this Court issue a Writ of Certiorari to the Supreme Court of the State of Illinois to certify and send to this Court a complete transcript of the record herein, to the end that the cause may be reviewed and determined by this Court as provided by law and that the judgment below may be reversed, and for such other and further relief as may be appropriate and granted in the premises.

CITY OF HIGHLAND PARK,
Petitioner.

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